Supreme Court, U.S.
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No. 93-506

In the Supreme Court of the United States

OCTOBER TERM, 1993

JEFFREY WILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the alleged mental infirmities of the trial judge so interfered with his exercise of judgment and discretion as to deprive petitioner of due process.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 997 F.2d 378.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1993. The petition for a writ of certiorari was filed on September 27, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted of conspiracy to distribute marijuana,

in violation of 21 U.S.C. 846; distribution of marijuana and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a); and managing or controlling a building for the purpose of storing and distributing marijuana, in violation of 21 U.S.C. 856. He was sentenced to 188 months' imprisonment, to be followed by three years' supervised release. He also was fined $82,300 and ordered to forfeit real and personal property used in the drug offenses.* The court of appeals affirmed. Pet. App. 1-15.

1. Petitioner owned and operated a motorcycle shop in Marion, Iowa, which he used to store and distribute marijuana. Early in 1988, federal agents began investigating a drug conspiracy involving Curtis Holub. On February 11, Chris Mottinger, who was cooperating with federal agents and wearing a recording device, obtained a sample of marijuana from Holub at Holub's home. A few days later, an informant recorded a conversation among himself, Kevin Meggers, and petitioner, in which they discussed petitioner's drug trafficking. Another cooperating individual recorded a conversation between himself and Meggers, in which Meggers described petitioner's drug activities. See Pet. App. 2.

On February 19, Holub sold one pound of marijuana to Mottinger and an undercover agent and negotiated a sale of another 50 pounds of marijuana, which was to occur on February 22. On February 22, Holub went to Meggers' house to get the marijuana, believing that Meggers had secured the marijuana from petitioner.

* The reference to a fine of $83,200 at Pet. App. 4 is inconsistent with the judgment of the district court. See Gov't C.A. App. 4.

But Meggers did not have the marijuana, and the 50-pound sale did not occur. At the same time, however, Pat McMickle was purchasing 82 pounds of marijuana from petitioner at his motorcycle shop. McMickle immediately resold the marijuana to an undercover agent and was arrested. He agreed to cooperate and identified petitioner as the person who sold him the marijuana. McMickle told the federal agent that petitioner had more marijuana stored in his shop. In cooperation with authorities, McMickle returned to petitioner's shop wearing a recorder and told petitioner that the expected purchasers of the 82 pounds of marijuana had not shown up. Shortly thereafter, both petitioner and McMickle were taken into custody. See Pet. App. 2.

The agents took petitioner to a motel room, told him they had seized the 82 pounds of marijuana from McMickle, and said they were interested in his cooperation in exchange for their agreement that further information provided by petitioner would not be the basis for additional charges. Petitioner agreed to cooperate and gave the agents the names of others to whom he was selling drugs and a brief sketch of their activities. In his motorcycle shop, petitioner gave the agents over 30 pounds of marijuana he had there, along with various items of drug paraphernalia and records. Although petitioner was indicted with Holub and two other co-conspirators, he was tried individually and convicted on all counts in which he was charged. See Pet. App. 2-4.

2. In preparation for his appeal, petitioner selected excerpts from 71 pages of transcript (out of more than 1500 pages in the record) that he believed showed instances of the trial judge's infirmities and submit-

ted them to a clinical psychologist, Stephen J. Chiulli, who did not personally observe or interview the judge. See Gov't Sealed C.A. Br. 71; Pet. App. 19-63. On appeal, petitioner raised numerous claims of error, including the claim—presented in a separate brief under seal—that the mental infirmities of the trial judge had deprived him of due process. In support of that claim petitioner filed an affidavit submitted by Chiulli. Pet. App. 16-18. The affidavit explained that the transcript permitted evaluation of the judge's "verbal output" and could "indicate problems in brain function," but was "not sufficient to identify the etiology or cause of the problems." *Id.* at 16. The psychologist observed that "the very frequent pauses seen in the transcript" that he examined "appear to reflect a serious difficulty in word finding" and that the examined transcript also "appears to reflect memory difficulties separate from word retrieval." *Id.* at 17. From his evaluation, the psychologist could only "strongly advise that the individual identified in the transcript as 'the Court' seek immediate medical attention" because "[t]here are a variety of medical problems that could cause the difficulty noted above, some of which require rapid medical intervention." *Ibid.* The psychologist further acknowledged that further "neuropsychological evaluation or careful examination by a Speech and Language Pathologist * * * are usually needed to determine the impact of the difficulties on day to day or vocational functioning." *Id.* at 17-18.

3. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 1-15. With respect to the claim presented in the petition (which petitioner

had presented to the court of appeals under seal), the court stated:

> Finally, [petitioner] ha[s] submitted a portion of [his] brie[f] under seal, together with excerpts from the transcripts and related materials. We have considered the arguments made under seal with care. They are serious arguments. After considering all of the relevant factors, we hold that no error occurred affecting [petitioner's] substantial rights.

Id. at 15.

ARGUMENT

Petitioner argues (Pet. 4-20) that the trial judge was so lacking in mental competence that petitioner's trial did not provide due process. That argument does not warrant review by this Court.

1. At the outset, we note that petitioner failed to raise his competency claim in the district court, even though he acknowledges (Pet. 4-5) that he was aware of the facts on which he bases the claim even before the trial began. Although petitioner asserts that he had "no * * * remedy during the midst of trial," Pet. 5, his pretrial knowledge enabled him to raise the claim even before the trial began. In any event, even if petitioner had not become aware of the problem until the trial began, the Federal Rules of Criminal Procedure provide for the replacement of a judge if he becomes disabled after a jury trial has commenced. See Fed. R. Crim. P. 25(a). Finally, to the extent petitioner was concerned about the possibility of prejudicing himself before that judge, he might have filed a motion for a writ of prohibition in the court of appeals under seal. See Fed. R. App. P. 21; Pet. 5 n.1 (indicating that

at oral argument the court of appeals suggested that it would have entertained such a motion).

Petitioner's failure to raise the claim in the trial court significantly limits the scope of review of that claim. As the government argued in the court of appeals (Gov't Sealed C.A. Br. 71), the lower courts generally have held that a closely analogous claim for disqualification of a judge for bias should be raised at the earliest moment after the relevant facts become known to the moving party. *In re Abijoe Realty Corporation*, 943 F.2d 121, 126 (1st Cir. 1991); *United States* v. *Owens*, 902 F.2d 1154, 1156 (4th Cir. 1990); see, *e.g.*, *Phillips* v. *Amoco Oil Company*, 799 F.2d 1464, 1472 (11th Cir. 1986), cert. denied, 481 U.S. 1016 (1987); *Oglala Sioux Tribe* v. *Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983). Because petitioner did not raise his claim for disqualification at the trial stage, the government argued (Gov't Sealed C.A. Br. 71-72) that the court of appeals should have declined to entertain the claim. See *American Imaging Services, Inc.* v. *Eagle-Picher Industries, Inc.* (*In re Eagle-Picher Industries, Inc.*), 963 F.2d 855, 862-863 (6th Cir. 1992); *United States* v. *York*, 888 F.2d 1050, 1056 (5th Cir. 1989); *Willner* v. *University of Kansas*, 848 F.2d 1023, 1028-1029 (10th Cir. 1988), cert. denied, 488 U.S. 1031 (1989). In the alternative, the government argued (Gov't Sealed C.A. Br. 72) that, if the court of appeals were to consider the claim, petitioner's failure to raise it at the trial stage required that the judge's participation in petitioner's case be evaluated only for plain error under Fed. R. Crim. P. 52(b). See *United States* v. *Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991), cert. denied, 112 S. Ct. 2975 (1992); *United States* v. *Schreiber*, 599 F.2d 534, 535-536 (3d

Cir.), cert. denied, 444 U.S. 843 (1979). The court of appeals' conclusion that "no error occurred affecting [petitioner's] substantial rights," Pet. App. 15, suggests that the court accepted the government's argument that the plain-error standard of review was appropriate. See Fed. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

Petitioner does not argue that the court of appeals' apparent conclusion that the district judge's behavior at trial did not amount to plain error presents a question warranting review by this Court. Instead, petitioner claims that the appellate court found that "any error in the proceedings [was] harmless," Pet. 6; see Pet. 16-17, and then argues that harmless error analysis should not apply to a claim of judicial incompetence, Pet. 19-20. But there is no basis for petitioner's implicit assumption that the court of appeals affirmed petitioner's conviction because it found an error that was "harmless"; it never used that term, but instead found that "no error occurred affecting [petitioner's] substantial rights." Pet. App. 15; see *United States* v. *Olano*, 113 S. Ct. 1770, 1777-1778 (1993) (discussing differences between harmless-error and plain-error analysis). Petitioner's harmless-error contention is not presented by this case.

Similarly, petitioner's argument (Pet. 6) that the court of appeals erred by not remanding to the district court for a hearing into the judge's competence is meritless. By failing to raise his claim in a timely manner, petitioner forfeited his opportunity to develop a complete record of the district judge's competence and to have the issue resolved before the case

proceeded to judgment. Petitioner cannot take advantage of his election to see whether he achieved an acquittal at trial before raising the competency issue. See *Abijoe Realty*, 943 F.2d at 126 ("[A] party, knowing of a ground for requesting disqualification, can not be permitted to wait and decide whether he likes subsequent treatment that he receives.") (quoting *In re United Shoe Machinery Corporation*, 276 F.2d 77, 79 (1st Cir. 1960)).

On the merits, the decision of the court of appeals that the trial judge's conduct at petitioner's trial did not amount to plain error is reasonable. The court of appeals exhaustively considered numerous claims that the trial judge had erred in a variety of rulings at trial, but concluded on the merits that each of those separate rulings was defensible. Pet. App. 4-10, 13-14. The petition does not challenge the correctness of the court of appeals' conclusions on those issues, which thus must be taken as correct for purposes of the petition. In the absence of any further record evidence of disability on the part of the trial judge, the best evidence of the judge's mental capacity is the court of appeals' conclusion that the judge's mental capacity was adequate to cause him to rule correctly on the points challenged by petitioner. Thus, petitioner's claim (Pet. 16-18) that the trial judge was unable to "engage in a legitimate and meaningful exercise of discretion" is belied by the correctness of his rulings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

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